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February 13, 2008

BY FACSIMILE AND HAND DELIVERYHonorable Ross Johnson, Chairman
& Commissioners Remy, Huguenin, Lcidigh and Hodson
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814Re: Agenda Item 16: Pre-Notice of Amendments to Regulations 18360 and 18361

Dear Chairman Johnson & Commissioners:

The following comment is made in broad support of the approaches taken in the proposed pre-notice amendments to Regulations 18360 and 18361, and also to offer some additional suggestions with respect to the Commission's enforcement regulations and policies that are not part of the pre-noticed amendments.¹

1. Proposed Amendments to Regulation 18360.

This proposal allows for further delegation of the Executive Director's authority with respect to enforcement matters, and thus would allow the Executive Director to play a supervisory role with respect to the initiation and prosecution of administrative and civil enforcement matters. Consistent with recent cases which call for a "wall of separation" between the administrative and civil prosecutors of an agency and the agency's decision-makers, this amendment would allow for such separation. I have submitted a suggestion to amend Regulation 18362, concerning Probable Cause hearings, which would *require* that a designee of the Executive Director be substituted as Probable Cause decision-maker when the Executive Director initiates an administrative complaint or requests that a civil action be commenced seeking fines and penalties (also part of a suggested amendment to Regulation 18361.2.) I support the approach of this regulation, provided that a more definitive delegation of authority is required, for example in Regulation 18362, if the Commission contemplates that the Executive Director will have an ongoing role in enforcement investigation or prosecution decisions.

¹ This comment reflects my views and not necessarily the views of my firm, my clients or the California Political Attorneys Association Task Force on FPPC Enforcement.

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2. Proposed Amendments to Regulation 18361.

This amended proposal addresses many of the comments made by current California Political Attorneys Association Chair Deborah Caplan, Esq. and me at the January 14, 2008 Commission meeting. In particular, it (1) conforms the regulation to the mandates of Government Code § 83116; (2) specifies that in most instances respondents would be provided a copy of the complaints filed against them; (3) clarifies that when the Commission provides a copy of a complaint or notice to a complainant or the public that it has commenced a preliminary investigation, the notice will state that no presumption should be made that a violation has occurred (as is currently the case when the Commission notices the issuance of an Accusation in an administrative enforcement case); and (4) provides that in most instances Commissioners would be provided the same, or more, information given to the public about the filing of a complaint. I support this regulation as drafted for pre-notice, with the request that the Commission not stop with these two regulations, but take up as soon as practicable some other issues addressed below.

3. Other Enforcement Regulatory Issues.

There are a number of additional issues related to enforcement procedures that need attention, in my view. One of the most important of these is the process related to the Commission's decision to initiate civil litigation. Another is that current procedure does not provide a formal, "pre-probable cause" opportunity for a respondent to show the Commission either that it lacks jurisdiction of a matter or to present facts that establish that the Commission should take no further action on a complaint.

(a) Decisions to Initiate Civil Action. Under current procedures set forth in Regulation 18361.2, the Commission makes a determination to initiate civil litigation with only the input of enforcement staff and without any opportunity for a potential respondent to show why civil action should not be initiated. In addition to the probability that the Commission's current procedure may violate the Morongo case holdings concerning due process and separation of agency functions (discussed above with respect to the proposed amendment to Regulation 18360), the procedure also denies the due process provided for in the "probable cause" procedure currently applicable to administrative enforcement prosecutions. The proposed solution is to require a "probable cause" determination before the Commission initiates civil litigation concerning fines and penalties. Under this proposal, the Commission would *not* need to go through the probable cause process in cases in which it seeks only to enforce a cease and desist order under Gov't Code § 83116(a), another order under Gov't Code § 83116(b) (such as to require the filing of a report that had previously been ordered), or when it seeks an injunction under Gov't Code § 91003. In each of these situations, the civil action would

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be to enforce a stipulated or final administrative order of the Commission or to seek an injunction, where the need for Commission expedition was a paramount factor.

(b) Pre-Probable Cause Proceedings. At the January 2008 Commission meeting, I commented that one established method the Federal Election Commission ("FEC") has used to "separate the wheat from the chaff" of complaints is to afford a respondent the opportunity to establish at an early stage that the Commission has no jurisdiction or no legal or factual basis to go forward with a complaint. My suggested approach is to add a new regulation (for convenience I numbered it Regulation 18361.35) that would provide a procedure for a respondent to make such a submission to the Commission. Under this proposal, a respondent in most situations would have 15 days from notification of a complaint against him or her (and a copy of the complaint) to show by facts, statements under penalty of perjury or legal reasons why the Commission lacks jurisdiction or there is no factual basis to proceed on the complaint. The 15 days could be extended another 15 days by the Commission on a good cause showing, or if the Commission believed it needed further information or clarification from a respondent in order to fully consider taking no further action.

(c) Mandatory Delegation by Executive Director of Authority. As discussed above, proposed Regulation 18360 on this agenda would provide the Executive Director discretionary authority to delegate his duties with respect to enforcement matters to someone else at the Commission or to an administrative law judge. Under my suggested revision to Regulation 18362, such delegation would be *mandatory* when the Executive Director participates in a prosecutorial role in either administrative or civil enforcement proceedings, either on an ongoing basis or by initiating an administrative enforcement action or requesting Commission authority to initiate civil action.

(d) Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board and Morongo Band of Mission Indians v. State Board of Control Cases and Communications between Staff and Commission. In *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 40 Cal.4th 1 (2006) ("ABC case"), the California Supreme Court held that the Administrative Procedure Act's prohibition against certain *ex parte* contacts between an agency's decision-makers and employees or representatives of an agency that is a party to an administrative adjudicative proceeding applied to require a separation of functions between the agency's decision-makers and its employees engaged in both advocacy and decision-making for the agency. (See Gov. Code § 11430.10, subd. (a); § 11430.70, subd. (a); and exceptions in §§ 11430.20, subd. (b) and 11430.30, subd. (a)). The Supreme Court affirmed the general rule in a case involving *ex parte* contacts in connection with a particular adjudicative case, but the holding is broader. Recently, the Third District Court of Appeal's decision in *Morongo Band of Mission Indians v. State Board of Control*, rev. granted, 67 Cal.Rptr. 3d 465 (2007), which disqualified an agency attorney from participating in an administrative

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hearing and also acting as an advisor to the agency in question in an unrelated proceeding, violated the APA's separation of functions requirements. This decision was vacated upon grant of review by the Supreme Court in late 2007.

At a minimum, the current law would appear to require avoidance of *ex parte* communications between an agency employee involved in prosecutorial functions and the agency decision-makers in a particular case, except on certain non-substantive procedural matters. Because the Supreme Court in *Morongo* is likely to provide greater clarification of the broader issue of potential disqualification of an agency attorney from participating in a prosecutorial role at the same time the attorney is acting as an advisor in unrelated proceedings, at a minimum the Commission should consider adopting a mandatory disqualification and delegation requirement with respect to the Executive Director under Regulation 18360 and 18362, if the Commission expects the Executive Director to play an ongoing role in agency prosecutorial decision-making, and also a tighter *ex parte* rule to cover anticipated interactions between the Executive Director or other agency prosecutors on a broad variety of matters in addition to a particular enforcement matter.

In addition, other Commission enforcement regulations such as Regulation 18361.5 (concerning administrative hearing decisions and procedures) and 18361.9 (concerning administrative hearing rehearing procedures), also would appear to be implicated by the *ABC* case holding, and may require modification with respect to delegation of authority by the Executive Director to another agency employee akin to proposed Regulation 18360, if the Commission determines that the Executive Director should have an ongoing role in enforcement investigation and prosecution decision-making.

4. Enforcement Policy Discussion.

In addition to considering specific amendments to your enforcement regulations, I would request that the Commission take time at its next meeting or very soon to have a thorough presentation by staff and public input on the Commission's enforcement priorities and fine policies. As part of that presentation, it would be useful for staff to present a summary of the McPherson Commission's recommendations concerning enforcement, the extent to which these recommendations have or have not been implemented, and the staff's current recommendations as to improvements in the enforcement process that would facilitate timely processing and prosecution of appropriate cases. Additional changes, such as those proposed in the currently-noticed regulations, would advance the cause that Chairman Johnson has espoused, to expedite the investigation and disposition of enforcement matters. Under the current system, justice delayed is justice denied, not only for the public but also for persons subject to complaints and Commission enforcement investigations.

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Thank you for the opportunity to comment on the pre-noticed regulations and to offer some additional approaches to improving the enforcement process from a due process perspective.

Very truly yours,



Charles H. Bell, Jr.

CHB: sd

Enclosure

cc: Michael Salerno, Esq., Executive Director
Scott Hallabrin, Esq., General Counsel
Amanda Saxton, Esq., Enforcement Division Chief

DRAFT

§ 18361.2. ~~Memorandum Respecting Civil Litigation.~~

(a) (1) If the Executive Director concludes civil litigation should be initiated, he or she shall notice a "probable cause" hearing pursuant to 2 Cal. Code of Regulations Section 18361.4, except in the event the civil litigation seeks only to enforce a cease and desist order under section 83116(a), another order under section 83116(b), or to obtain an injunction under section 91003.

(2) If the civil litigation seeks only to enforce a cease and desist order under section 83116(a), another order under section 83116(b), or to obtain an injunction under section 91003, the Executive Director shall submit to the Commission a written memorandum, which shall be first reviewed by the General Counsel, or an attorney from the Legal Division, summarizing the facts and the applicable law of the case and recommending the initiation of a lawsuit. The memorandum shall include all exculpatory and mitigating information known to the staff.

(b) (1) For actions brought pursuant to subdivision (a)(2), the Commission shall review the memorandum described in subdivision (a)(2) at an executive session. The General Counsel, or an attorney from the Legal Division, and the Commission Assistant shall be in attendance. No other member of the staff may be present unless the Commission meets with a member of the staff for that person to answer questions. The Commission may not resume its deliberations until the person is no longer present. Any communication between the Commission and the person during the executive session shall be recorded. After review of the memorandum, or the conduct of the "probable cause" hearing pursuant to 2 Cal. Code of Regulations Section 18361.4 in cases subject to subdivision (a)(1), the Commission may direct the Executive Director to do any of the following:

(1) Initiate civil litigation.

(2) As provided in subdivision (a)(1), or otherwise, decide whether probable cause proceedings should be commenced pursuant to 2 Cal. Code of Regulations Section 18361.4.

(3) Return the matter to the staff for further investigation.

(4) Take no further action on the matter or take any other action it deems appropriate.

(c) If the Commission decides to initiate civil litigation, the Commission may then permit other members of the staff to attend the executive session.

(d) If the Executive Director deems it necessary, he or she may call a special meeting of the Commission to review a staff memorandum recommending the initiation of civil

litigation.

(e) It is the intent of the Commission in adopting this section to preserve for the members of the Commission the authority to decide whether alleged violations should be adjudicated in administrative hearings or in civil litigation, while at the same time avoiding the possibility that discussions with members of the staff might cause members of the Commission to prejudge a case that might be heard by the Commission under Government Code Section 83116.

§18361.35 Pre-Probable Cause Proceedings.

- (a) Prior to taking any action under 2 Cal. Code of Regulations Section 18360(d)(1)(E)(2), 18361.2(a) or (b), or 18361.4, the Commission shall afford the respondent(s) an opportunity to respond, indicating that the Commission has no jurisdiction in the matter or that there is no reason for the Commission to take further action on the complaint.
- (b) In the response, the respondent(s) may set forth facts, legal reasons or statements under penalty of perjury supporting the respondent's(s') contentions that the Commission has no jurisdiction in the matter or that there is no reason for the Commission to take further action on the complaint.
- (c) The respondent(s) shall have fifteen (15) days to respond, from the date a notice of opportunity to respond is mailed by the Commission to the respondent(s). The respondent(s) may have an additional fifteen (15) days to respond, upon good cause shown to the Executive Director. If the Executive Director determines it would be useful to resolve the matter and requests the respondent(s) to submit additional information to the Commission to supplement their response, the respondent(s) shall have fifteen (15) additional days to supplement their response from the date a request for additional information is mailed by the Commission to the respondent(s).
- (d) If the Executive Director determines that the Commission has no jurisdiction in the matter or that there is no reason for the Commission to take further action on the complaint, the Executive Director shall promptly notify the respondent(s) of that determination. The Executive Director shall also notify the complainants of that determination.

§ 18361.4. Probable Cause Proceedings.

(a) Probable Cause Report. If the Chief of the Enforcement Division decides to commence probable cause proceedings pursuant to Government Code Sections 83115.5 and 83116, or the Executive Director determines to initiate civil proceedings other than to enforce a cease and desist order under section 83116(a), another order under section 83116(b), or to seek an injunction under section 91003, he or she shall direct the Enforcement Division staff to prepare a written report, hereafter referred to as "the probable cause report." The probable cause report shall contain a summary of the law and evidence gathered in connection with the investigation, including any exculpatory and mitigating information of which the staff has knowledge and any other relevant material

and arguments. The evidence recited in the probable cause report may include hearsay, including declarations of investigators or others relating the statements of witnesses or concerning the examination of physical evidence.

(b) At least 21 days prior to any determination of probable cause, the Enforcement Division staff shall provide the following, by service of process or registered mail with return receipt requested, to all proposed respondents:

(1) A copy of the probable cause report;

(2) Notification that the proposed respondents have the right to respond in writing to the probable cause report and to request a probable cause conference at which the proposed respondent may be present in person and represented by counsel, and;

(3) If the Commission met in executive session on this matter pursuant to 2 Cal. Code of Regulations Section 18361.2, a copy of any staff memoranda submitted to the Commission at that time along with the recording of any discussion between the Commission and the staff at the executive session as required in subdivision (b) of 2 Cal. Code of Regulations Section 18361.2.

(c) Response to Probable Cause Report. Each proposed respondent may submit a written response to the probable cause report. The response may contain a summary of evidence, legal arguments, and any mitigating or exculpatory information.

A proposed respondent who submits a response must file it with the Executive Director and provide a copy, by service of process or registered or certified mail with return receipt requested, to all other proposed respondents listed in the probable cause report not later than 21 days following service of the probable cause report.

The Commission staff may submit any evidence or argument in rebuttal to the response. When the Commission staff submits evidence or argument in rebuttal to the response, it shall provide a copy, by service of process or registered or certified mail with return receipt requested, to all proposed respondents listed in the probable cause report not later than 10 days following the date the response was filed with the Executive Director.

The delegatee of the Executive Director shall conduct all proceedings and make all determinations under this section if the Executive Director has filed a request for civil action, initiated a complaint as complainant. The delegatee may extend the time limitations in this section for good cause. At any time prior to a determination of probable cause, the delegatee of the Executive Director may allow additional material to be submitted as part of the initial response or rebuttal.

(d) Probable Cause Conference. Any proposed respondent may request a probable cause conference. The request shall be served upon the Executive Director and all other proposed respondents not later than 21 days after service of the probable cause report unless the delegatee of the Executive Director extends the time for good cause. The delegatee of the Executive Director shall fix a time for the probable cause conference and conduct the conference informally. The conference shall be closed to the public unless a proposed respondent requests and all other proposed respondents agree to a public conference. If the conference is not public, only members of the Commission staff, any proposed respondent and his or her legal counsel or representative shall have the right to be present and participate. The delegatee of the Executive Director may allow witnesses to attend and participate in part or all of the probable cause conference. In making this determination, the delegatee of the Executive Director shall consider the relevancy of the witness' proposed testimony, whether the witness has a substantial interest in the proceedings, and whether fairness requires that the witness be allowed to participate. Representatives of any civil or criminal prosecutor with jurisdiction may attend the conference at the discretion of the delegatee of the Executive Director if they agree to respect the confidential nature of the proceedings. If the conference is not open to the public and none of the parties and the presiding officer object, the conference may be conducted in whole or in part by telephone.

The probable cause conference shall be recorded. The delegatee of the Executive Director may determine whether there is probable cause based solely on the probable cause report, any responses or rebuttals filed and any arguments presented at the probable cause conference by the interested parties. If the delegatee of the Executive Director requires additional information before determining whether there is probable cause, he or she may permit any party to submit additional evidence at the probable cause conference.

(e) Finding of Probable Cause. The delegatee of the Executive Director may find there is probable cause to believe a violation has occurred if the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a proposed respondent committed or caused a violation. A finding of probable cause by the delegatee of the Executive Director does not constitute a finding that a violation has actually occurred.

The delegatee of the Executive Director shall not make a finding of probable cause if he or she is presented with clear and convincing evidence that, at a time prior to the alleged violation, the violator consulted with the staff of the Commission in good faith, disclosed truthfully all the material facts, and committed the acts complained of either in reliance on the advice of the staff or because of the staff's failure to provide advice.

If the delegatee of the Executive Director makes a finding of probable cause, he or she shall authorize the Enforcement Division to initiate civil litigation in the case of a matter pursuant to 2 Cal. Code of Regulations Section 18361.2(a)(1), or to prepare an Accusation pursuant to Government Code Section 11503 and have it served upon the

person or persons who are subjects of the probable cause finding. The Executive Director shall publicly announce the finding of probable cause and/or the initiation of civil litigation. The announcement shall contain a summary of the allegations and a cautionary statement that the respondent is presumed to be innocent of any violation of the Act unless a violation is proved in a subsequent proceeding. The Chief of the Enforcement Division shall be responsible for the presentation of the case in support of the Accusation at an administrative hearing held pursuant to Government Code Section 83116.